UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LEONAL MARIN-TORRES,

Petitioner,

v.

JEFFREY UTTECHT,

Respondent.

CASE NO. C06-830 RSM-JPD

ORDER DENYING RESPONDENT'S MOTION TO STAY THE WRIT PENDING APPEAL

This matter comes before the Court on "Respondent's Motion to Stay the Writ Pending Appeal." (Dkt. #46). On January 17, 2008, this Court adopted the Report and Recommendation of the Honorable United States Magistrate Judge James Donohue ("Judge Donohue"), granting Petitioner's writ of habeas corpus pursuant to 22 U.S.C. § 2254, and directing Respondent to release Petitioner within 30 days from the date of that Order unless the State of Washington commenced proceedings to retry Petitioner. (Dkt. #44). Respondent has since appealed this Court's decision to the United States Court of Appeals for the Ninth Circuit, and now moves the Court to stay the issuance of the writ pending the appeal.

Having reviewed Respondent's motion, Petitioner's response, Respondent's reply, and the remainder of the record, the Court hereby finds and orders:

(1) "Respondent's Motion to Stay the Writ Pending Appeal" (Dkt. #46) is DENIED. Fed. R. App. P. 23(c) provides:

While a decision ordering the release of a prisoner is under review, *the prisoner must* -

> unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise - be released on personal recognizance, with or without surety.

Id. (emphasis added).

Fed. R. App. P. 23(d) further provides that "an initial order governing the prisoner's custody or release . . . *continues in effect pending review* unless for special reasons shown[.]" *Id.* (emphasis added). Rule 23(c) "undoubtedly creates a presumption of release from custody in such cases," and Rule 23(d) "creates a presumption of correctness for the order of a district court entered pursuant to Rule 23(c)." *Hilton v. Braunskill*, 481 U.S. 770, 774, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). However, "[f]ederal habeas corpus practice, as reflected by the decisions of [the Supreme Court], indicates that a court has broad discretion in conditioning a judgment granting habeas relief." *Id.* at 775. Therefore the presumptions created by Rules 23(c) and (d) can be overcome in certain situations. *See id.* at 774; *United States v. Igbonwa*, 120 F.3d 437, 444 (3d Cir. 1997).

Specifically, the Supreme Court has set forth the following four factors in determining whether to stay a habeas petitioner's release pending a State's appeal: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton*, 481 U.S. at 776. These factors contemplate individualized judgments in each case, and the formula cannot be reduced to a set of rigid rules. *See id.* at 777. But "[t]he balance may depend to a large extent upon determination of the State's prospects of success in its appeal." *Id*. at 778. Thus, at a minimum, the State must demonstrate "that it has a strong likelihood of success on appeal, or where failing that, it can nonetheless demonstrate a *substantial case on the merits* [and] the second and fourth factors . . . militate against release." *Id.* (emphasis added); *Natural Resources Defense Council, Inc. v. Winter*, 502 F.3d 859, 863 (9th Cir. 2007). Where the State's showing on the merits falls below this level, the preference for release should control. *Hilton*, 481 U.S. at 778; *see also Moore v. Calderon*, 56 F.3d 39, 40, n.1 (9th Cir. 1995) *rev'd on other grounds by Calderon v. Moore*,

518 U.S. 149 (1996) (noting that the State must demonstrate a substantial case on the merits even when public and State interests weigh against release).

Here, Respondent has failed to establish a "strong likelihood of success" on appeal, much less a "substantial case on the merits." Respondent argues that this Court applied an overly expansive interpretation of *Faretta v. California*, 422 U.S. 806, 95 S.Ct 2525, 45 L.Ed.2d 562 (1975), in holding that Petitioner's constitutional right to self-representation was violated. However, *Faretta* and its progeny - and particularly a recent analogous Ninth Circuit case - clearly establishes that granting Petitioner's writ of habeas corpus in the instant case was justified. *See Frantz v. Hazey*, __ F.3d __, No. 05-16024, 2008 WL 170323 (9th Cir. Jan. 22, 2008) (*en banc*).

In *Frantz*, a defendant waived his right to counsel and chose to represent himself *pro se*. *Id.* at *1. The trial judge nevertheless appointed standby counsel for the duration of the trial. *Id.* Before the jury returned its verdict, the jury submitted questions regarding the evidence submitted at trial. *Id.* at *3. The trial judge addressed the two questions in a chambers conference attended by the prosecutor and defendant's standby counsel, but not the defendant himself. *Id.* The Ninth Circuit found that the defendant's absence from the chambers conferences was a clear violation of the defendant's *Faretta* right.[1] *Id.* at *14. The Ninth Circuit held "that the conference triggered [defendant's] *Faretta* rights because it resolved the content of the judge's response to the juror's request. The chance to shape the jury's interpretation of an important tactical decision *is at least as important as the chance to make the decision itself*." *Id.* at *13 (emphasis added). Furthermore, the Ninth Circuit followed the well-established principle set forth by the Supreme Court that when a *Faretta*

[1] The *Frantz* court ultimately remanded the case to the district court to hold an evidentiary hearing to determine whether the defendant waived his right to be present at the chambers conference. The Court noted that the record was far from complete because there was no specific evidence concerning the circumstances that gave rise to standby counsel's solo participation in the conferences. *Frantz*, 2008 WL 170323, at *15. Notwithstanding the ultimate disposition of the case, the legal principles from *Frantz* are clearly evident: a defendant's absence from a strategically important phase of the trial is a violation of his *Faretta* rights. *Id*. at *14.

right is violated, the error is structural and not susceptible to harmless error review. *Frantz*, 2008 WL 170323, at *6.

In the instant case, it is undisputed that the trial court precluded Petitioner from participating in the trial. Specifically, Petitioner was not provided with an interpreter when the trial court addressed a jury question despite the fact that he was given an interpreter throughout the trial. The trial court also did not seek Petitioner's views before deciding how to answer the question submitted by the jury. Nevertheless, Respondent argues that the trial court's actions in the instant case only deprived Petitioner of his right to be present, and therefore his claim does not involve a *Faretta* violation, but a due process violation which is subject to a harmless error analysis. (Dkt. #51 at 3).

Indeed, it is a maxim of constitutional law and firmly entrenched in the principles of a jury trial that a defendant has a right to be present at every stage of his trial. *See United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, L.Ed.2d 486 (1985); *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); Fed. R. Crim. P. 43. And while Respondent is correct in asserting that the right to be present is subject to a harmless error analysis, this right is clearly distinguishable from a *Faretta* right which allows a criminal defendant to represent himself. 422 U.S. at 836. The scope of a defendant's *Faretta* right was further discussed in *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), wherein the Supreme Court held that "[a] defendant's right to self-representation plainly encompasses certain specific rights to be heard. The *pro se* defendant must be allowed to *control the organization and content of his own defense*, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *Id.* at 174 (emphasis added).

Against *Faretta's* legal landscape, the facts in this case indicate that Petitioner was not only denied his right to be present, but that a clear violation of Petitioner's Sixth Amendment right of self-representation occurred. The "opportunity to strategize and to speak for [oneself] is a *Faretta* right protected by *McKaskle*." *Frantz*, 2008 WL 170323, at *14. It is

worth reiterating that "[t]he chance to shape the jury's interpretation of an important tactical decision *is at least as important as the chance to make the decision itself*." *Id.* at *13 (emphasis added). These fundamental rights were never given to Petitioner, thereby violating his *Faretta* rights.

Furthermore, "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a *question of law*." *Williams v. Taylor*, 529 U.S. 362, 412-413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (emphasis added). Here, it is evident that the state court applied the incorrect legal standard in evaluating the trial court's failure to provide Petitioner with an interpreter or to seek his views when the jury submitted its question during deliberations. Specifically, the Washington Court of Appeals noted that although it was an error for the trial court to exclude Petitioner from participating in the discussion of the jury inquiry, or to know what the trial court said in response, the error was harmless because the instructions were not erroneous, and no new information was given to the jury. (Dkt. #51 at 3-4); (Resp.'s Ex. 7, at 5-6). As a result, it is clear that the state court incorrectly analyzed the error under a harmless error standard, rather than a violation of Petitioner's *Faretta* rights.

Respondent also argues that *Frantz* does not control because it is "Supreme Court precedent, rather than Ninth Circuit precedent, that the State court decision in [Petitioner's] case must be compared to." (Dkt. #51 at 3). While unequivocally true that *Frantz* is not a Supreme Court case, *Frantz* relies on Supreme Court precedent in reaching its conclusion. Moreover, the Supreme Court has firmly established the principle that a denial of a defendant's *Faretta* right to represent himself is a structural error. *See Arizona v. Fulmante*, 499 U.S. 279, 310, 111 S.Ct, 1246, 113 L.Ed.2d 302 (1991); *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *United States v. Gonzales-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 2564, 165 L.Ed.2d 409 (2006). Consequently, this Court is not only relying on *Frantz* as persuasive authority, but more importantly, this Court relies on the substance underlying the opinion in reaching its own conclusion.

Ultimately, given *Faretta* and its progeny, coupled with the facts presented by this

case, this Court finds that Respondent has failed to meet its burden in establishing a "substantial case on the merits." As such, this Court finds it unnecessary to discuss the remaining three factors in the stay analysis, and finds that the presumption of release as contemplated by Fed. R. App. P. 23(c) controls. Accordingly, Respondent's motion is DENIED.

(2) The original recommendation made by Judge Donohue that this Court adopted is upheld. Respondent is directed to release Petitioner within thirty (30) days from the date of this Order, unless the State of Washington commences proceedings to retry him.

(3) The Clerk is directed to forward a copy of this Order to all counsel of record and to Judge Donohue.

DATED this 4 day of March, 2008.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE